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SUPER LATEX SDN BHD

v.

MULTI PURPOSE COMMODITY TRADING SDN BHD

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COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
ZAINUN ALI JCA
HASAN LAH JCA
[CIVIL APPEAL NO: M-02-677-1998]

C

25 JANUARY 2007

CONTRACT: *Breach - Supply of latex - Claim by plaintiff purchaser against defendant supplier - Whether plaintiff evinced intention not to be bound by contract - Whether defendant not in breach by failing to supply*

D

- Whether defendant's demand on bank guarantee justified - Contracts Act 1950, s. 40

The plaintiff and the defendant entered into a contract for the purchase of 1060 metric tons of latex. The plaintiff issued two

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bank guarantees in the sum of RM595,000 in the defendant's favour. The plaintiff purchased about 359,565 metric tons of latex from the defendant for which payment was settled late before 30 June 1990. The remaining latex was yet to be purchased by the plaintiff. It followed that the defendant made a demand on the

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bank for the guaranteed sum of RM595,000 and the bank made the payment. The plaintiff then filed a writ against the defendant for breach of contract claiming, amongst others, for the return of the sum of RM595,000. It was the plaintiff's case that it was under no obligation to take delivery of the remaining latex until 30

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June 1990. The defendant's case was that the plaintiff had already evinced an intention not to be bound by the contract well before 30 June 1990. The High Court dismissed the plaintiff's claim. Hence, the plaintiff's appeal.

Held (dismissing the appeal)

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Per Gopal Sri Ram JCA delivering the judgment of the court:

(1) The plaintiff was correctly under no obligation to take delivery of the remaining latex until 30 June 1990. It had paid its

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arrears of RM440,337.35 before 29 June 1990. If the defendant had called upon the plaintiff to take delivery of the

remaining latex before 30 June 1990, the defendant would have been in breach of contract. This is because a party to a contract is not entitled to call upon the promisor to fulfil his promise before the date of which the promise fell to be performed. However, what happened here was the opposite. It was the plaintiff who wrote in clear terms in a letter dated 25 May 1990 that it considered itself no longer bound by the contract. Hence, s. 40 of the Contracts Act 1950 was applicable. The trial judge's judgment disclosed no appealable error that warranted intervention by this court. The interpretation placed on the facts and documents by the trial judge was correct. (paras 9, 11, 12 & 13)

Bahasa Malaysia *translation of headnotes*

Plaintif dan defendan memeterai satu kontrak bagi pembelian 1060 tan metrik susu getah. Dua bank gerenti berjumlah RM595,000 telah dikeluarkan oleh plaintif kepada defendan. Sebanyak 359,565 tan metrik susu getah telah dibeli oleh plaintif di mana bayaran lewat dibuat sebelum 30 Jun 1990. Sementara itu, baki susu getah masih belum dibeli oleh plaintif. Berikutnya, defendan membuat tuntutan kepada bank bagi jumlah RM595,000 yang digerenti, dan bank membuat pembayaran seperti yang dipohon. Plaintif mendakwa defendan telah memungkiri kontrak, dan telah memfail writ terhadap defendan menuntut, antara lain, pembayaran sebanyak RM595,000 dikembalikan. Kes plaintif adalah bahawa ia tidak bertanggungan untuk mengambil penyerahan baki susu getah sebelum 30 Jun 1990. Manakala kes defendan pula adalah bahawa plaintif telah menunjukkan niat untuk tidak terikat dengan kontrak sebelum 30 Jun 1990 lagi. Mahkamah Tinggi menolak tuntutan plaintif dan plaintif merayu.

Diputuskan (menolak rayuan)
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

(1) Plaintiff sesungguhnya tidak mempunyai obligasi untuk mengambil penyerahan baki susu getah sebelum 30 Jun 1990. Ia telah membayar tunggakan yang berjumlah RM440,337.35 sebelum 29 Jun 1990. Jika defendan ada menyuruh plaintif mengambil penyerahan baki susu getah sebelum 30 Jun 1990, maka defendan telah memungkiri kontrak. Ini kerana satu pihak kepada kontrak tidak berhak untuk meminta promisor untuk menunaikan janjinya sebelum tarikh janji tersebut perlu

ditunaikan. Bagaimanapun, apa yang berlaku di sini adalah sebaliknya. Plaintif adalah merupakan pihak yang menulis dengan jelas melalui surat bertarikh 25 Mei 1990 bahawa ia menganggap dirinya tidak lagi terikat dengan kontrak. Oleh itu, s. 40 Akta Kontrak 1950 adalah terpakai. Penghakiman yang arif hakim tidak mendedahkan sebarang kesilapan yang mewajarkan campurtangan mahkamah ini. Pentafsiran yang dibuat oleh hakim bicara terhadap fakta dan dokumen-dokumen adalah betul.

Case(s) referred to:
Ban Hong Joo Mines Ltd v. Chen & Yap Ltd [1969] 2 MLJ 83 ***(refd)***
The Mersey Steel and Iron Co Ltd v. Naylor, Benzon & Co [1884] 9 App Cas 434 ***(refd)***
White & Carter (Council) Ltd McGregor [1962] AC 413 ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 40

For the appellant - D Kalaimany; M/s Kalai & Partners
For the respondent - Robert Lazar; M/s Shearn Delamore & Co

[Appeal from High Court, Melaka; Civil Suit No: 22-80-90]

Reported by Usha Thiagarajah

JUDGMENT

(Oral)

Gopal Sri Ram JCA:

[1] This is the judgment of the court.

[2] This is an appeal against the judgment of the High Court in Malacca dismissing a claim by the plaintiff alleging a breach of contract on the part of the defendant.

[3] The facts of the case have been dealt with so carefully by the learned trial judge that we are relieved from restating them. Suffice that we quote them from his judgment.

> The Plaintiff entered into three sales contracts with the Defendant for the purchase of a total of 1060 metric tons of latex concentrate in respect of which it issued two bank guarantees for the sum of RM 595,000.00 in favour of the Defendant. The

> Plaintiff purchased approximately 359,565 metric tons of latex from the Defendant. As of 3rd October 1989 the Plaintiff owed the Defendant a sum of RM 440,337.35 for the latex supplied. This amount was settled by the Plaintiff by 30th June 1990. With regard to the remaining latex concentrate which was not purchased by the Plaintiff as required by the sales contracts the Defendant suggested a washout. A washout occurs when the parties close out a contract by a monetary payment *in lieu* of actual performance. It is calculated by taking the difference between the contract price and the prevailing market price. This amounted to a sum of RM 954,054.90 for which the Defendant made a demand by letter dated 29th June 1990. After an exchange of correspondence between the parties the Defendant made a demand on the bank which had issued the two guarantees.

[4] We need to add that the bank paid the guaranteed sum of RM595,000 to the respondent on 22 October 1992 as demanded. The plaintiff then filed a writ claiming among others for the said sum of RM595,000. It is the plaintiff's case that it was under no obligation to take delivery of the remaining 700.635 dry metric tons of latex until 30 June 1990.

[5] The defendant's case, both in the court below and before us in this appeal is that well before 30 June 1990 the plaintiff had already evinced an intention no longer to be bound by the contract.

[6] Mr. Robert Lazar, counsel for the defendant, has referred us to the plaintiff's letter dated 25 May 1990 which was reproduced by the learned judge in his judgment. The following passage in that letter is of critical importance and must be reproduced. This is what the plaintiff says:

> I believe that Multi-Purpose's actions have cancelled the contract and we have no further obligation. I am willing however to work toward an acceptable compromise. I am deeply sorry that Multi-Purpose feels we are acting in bad faith. I am trying not to avoid payment nor to avoid the contract. We must realize that the glove business is poor and that concessions must be made to salvage what is left. You have told me that your board and management has taken you to task for this situation. I again offer to present the situation to your superiors and/or board to convince them (and you) of our honorable intentions. Whether you believe me or not, it is without question that I have lived up to my promises and not made any I cannot keep. We must trust each and work with each other whether or not we want to.

[7] Learned counsel for the defendant says the language in the above quoted paragraph is clear enough. It points to an unequivocal intention on the part of the plaintiff to be no longer bound by the contract for the sale and delivery of latex to be concluded between the parties.

[8] Learned counsel further submits that in these circumstances the defendant was entitled to write its letter of 29 June 1990 which is in the following terms, when shorn of its formality:

> We refer to the following contracts for which you have failed to take delivery:
>
> | Contract Number | Latex Concentrate Quantity (Dry M. Ton) | Contract price (Per dry Kg) | Delivery Period |
> |---|---|---|---|
> | PSLB 8901036(AE) | 112.635 | $4.60 | April 1989 |
> | PSLB 8901036(AE) | 150 | $4.60 | May 1989 |
> | PSLB 8901036(AE) | 150 | $4.60 | June 1989 |
> | PSLB 8901048(AC) | 90 | $3.80 | April 1989 |
> | PSLB 8901048(AC) | 135 | $3.80 | May 1989 |
> | PSLB 8901057 | 63 | $3.25 | May 1989 |
> | Total | 700.635 | | |
>
> Despite our repeated requests to you to take delivery of the above, you have by your conduct demonstrated your inability to do so.
>
> At the meeting held on 18 April 1990, as it was clear that you have failed to honour these contracts we suggested to you that the contracts should be closed and that it should be settled by way of payment of compensation, commonly referred to in the trade as 'wash-out'.
>
> Despite our proposals you have failed to respond positively and in the circumstances, we are left with no choice but to accept your breach and to claim the following sums due:

Contract Number	Dry M. Ton (Per dry Kg)	Contract price	Invoice back price (Per dry Kg)	Amount of Compensation
PSLB 8901036 (AE)	412.635	$4.60	$2.86	M$717,984.90
PSLB 8901048 (AC)	225	$3.80	$2.86	M$211,500.00
PSLB 8901057	63	$3.25	$2.86	M$ 24,570.00
	700.635			M$954,054.90

Please note that we have calculated our damages based on the prices prevailing on 18 April 1990. We shall be obliged if you could kindly make immediate payment of these sums, failing which we shall proceed to recover the same in whatever manner we deem fit.

[9] We are in agreement with Mr. Robert Lazar's argument. It is quite correct that the plaintiff was under no obligation to take delivery of the 700.635 metric tons until 30 June 1990. It is also quite correct to say that it had paid its arrears of RM 440,337.35 before 29 June 1990. However, that is not the end of the matter. If the plaintiff had not written that letter of 25 May in the terms which it did, and the defendant had called upon it to take delivery of the aforesaid quantity of latex before 30 June, there would have been no doubt that the defendant would have been in breach. This is because a party to a contract is not entitled to call upon the promisor to fulfill his promise before the date of which the promise fell to be performed. See *White & Carter (Council) Ltd. McGregor* [1962] AC 413. But that is not what happened here. What happened here was the opposite. It was the plaintiff who wrote in clear terms in the quoted letter that it considered itself no longer bound.

[10] To the facts of this case may be applied in apposite terms, the words of Lord Selborne, Lord Chancellor in *The Mersey Steel and Iron Co. Ltd. v. Naylor, Benzon & Co.* [1884] 9 App. Cas 434, at 438:

Upon the other point, I do not think it desirable to lay down larger rules than the case may require, or than former authorities may have laid down for my guidance, or to go into possible cases differing from the one with which we have to deal. I am content to take the rule as stated by Lord Coleridge in *Freeth v. Burr* (1), which is in substance, as I understand it, that you must look at the actual circumstances of the case in order to see whether the

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> one party to the contract is relieved from its future performance by the conduct of the other; you must examine what that conduct is, so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part; and I think that nothing more is necessary in the present case than to look at the conduct of the parties, and see whether anything of that kind has taken place here.

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[11] We need only add that s. 40 of the Contracts Act is in the same terms as the common law principle enunciated by the Lord Chancellor in the above quoted passage. That section reads:

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> When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

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[12] We may also add that Mersey Steel was applied by our former Federal Court in *Ban Hong Joo Mines Ltd. v. Chen & Yap Ltd* [1969] 2 MLJ 83.

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[13] We have scrutinized the learned trial judge's judgment anxiously and have taken into account all that has been said for the plaintiff in criticism of that judgment. We have nevertheless come to the conclusion that there was no appealable error disclosed that warrants intervention by this court. We are entirely in agreement with the learned trial judge on the interpretation placed on the facts and the documents.

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[14] In the result this appeal fails. It is dismissed. The respondent, (defendant in the court below), will have its costs of this appeal. All the orders of the High Court are affirmed. Deposit shall be paid out to the respondent to account of its taxed costs.

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